

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

|                       |   |                           |
|-----------------------|---|---------------------------|
| GERRY GP PHONGBOUPHA, | ) | No. C 12-1025 RMW (PR)    |
|                       | ) |                           |
| Petitioner,           | ) | ORDER GRANTING MOTION TO  |
|                       | ) | DISMISS; DENYING WITHOUT  |
| vs.                   | ) | PREJUDICE MOTION TO STAY; |
|                       | ) | REQUIRING ELECTION BY     |
|                       | ) | PETITIONER                |
| WARDEN A. HEDGPETH,   | ) |                           |
|                       | ) |                           |
| Respondent.           | ) | (Docket Nos. 12, 13)      |
|                       | ) |                           |

Petitioner, a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 21, 2012, respondent filed a motion to dismiss the petition for failure to exhaust state remedies. In lieu of an opposition, on September 6, 2012, petitioner filed a motion to stay the petition and hold the action in abeyance. For the reasons below, the court GRANTS respondent's motion to dismiss, DENIES without prejudice petitioner's motion to stay the petition, and directs petitioner to elect how he wishes to proceed.

**DISCUSSION**

Respondent argues, and petitioner concedes, that while Claims 1-4 were fairly presented to the California Supreme Court, petitioner's Claim 5 (ineffective assistance of counsel) was not. Because Petitioner's federal petition contains both exhausted and unexhausted claims, it is a "mixed" petition. See Rhines v. Weber, 544 U.S. 269, 277 (2005). The general rule is that a

1 federal district court must dismiss a federal habeas petition containing any claim as to which  
2 state remedies have not been exhausted. See Rose v. Lundy, 455 U.S. 509, 522 (1982).  
3 Therefore, respondent's motion to dismiss is GRANTED.

4 However, due to a critical one-year statute of limitations on the filing of federal habeas  
5 petitions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see 28  
6 U.S.C. § 2244(d), the court will not dismiss the mixed petition (and possibly cause a later-filed  
7 petition to be time-barred) without first giving petitioner the opportunity to elect whether to  
8 proceed with just the exhausted claims, or to try to exhaust the unexhausted claims before having  
9 this court consider the federal petition. Therefore, instead of an outright dismissal of the action,  
10 the court will allow petitioner to choose whether he wants to:

11 (1) dismiss the unexhausted claim and go forward in this action with only the exhausted  
12 claims; or

13 (2) dismiss this entire action and return to state court to exhaust all claims before filing a  
14 new federal petition presenting all of his claims; or

15 (3) move to stay these proceedings while he exhausts his unexhausted claim in the  
16 California Supreme Court.

17 In Rhines, the Supreme Court discussed the stay-and-abeyance procedure for a mixed  
18 petition such as this one. The Supreme Court cautioned district courts against being too liberal  
19 in allowing a stay because a stay works against several of the purposes of AEDPA in that it  
20 "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the  
21 resolution of the federal proceeding" and "undermines AEDPA's goal of streamlining federal  
22 habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court  
23 prior to filing his federal petition." Rhines, 544 U.S. at 277. Any stay must be limited in time to  
24 avoid indefinite delay. Id. at 277-78. Reasonable time limits would be thirty (30) days to  
25 proceed to state court and thirty (30) days to return to federal court after the final rejection of the  
26 claims by the state court. See id. at 278; Kelly v. Small, 315 F.3d 1063, 1071 (9th Cir. 2003),  
27 overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007).

1        There are two kinds of stays available in a habeas action: the Rhines stay and the  
 2        King/Kelly stay. A stay under Rhines “is only appropriate when the district court determines  
 3        there was good cause for the petitioner’s failure to exhaust his claims first in state court,” the  
 4        claims are not meritless, and there are no intentionally dilatory litigation tactics by the petitioner.  
 5        Id. at 277-78. Any such stay must be limited in time to avoid indefinite delay. Id. The court in  
 6        Rhines cautioned district courts against being too liberal in allowing a stay because a stay works  
 7        against several of the purposes of the AEDPA in that it “frustrates AEDPA’s objective of  
 8        encouraging finality by allowing a petitioner to delay the resolution of the federal proceeding”  
 9        and “undermines AEDPA’s goal of streamlining federal habeas proceedings by decreasing a  
 10        petitioner’s incentive to exhaust all his claims in state court prior to filing his federal petition.”  
 11        Id. at 277.

12        The King/Kelly stay is an alternative method for a petitioner who has some unexhausted  
 13        claims he wants to present in his federal habeas action. Under the procedure outlined in Kelly,  
 14        “(1) a petitioner amends his petition to delete any unexhausted claims; (2) the court stays and  
 15        holds in abeyance the amended, fully exhausted petition, allowing the petitioner the opportunity  
 16        to proceed to state court to exhaust the deleted claims; and (3) the petitioner later amends his  
 17        petition and re-attaches the newly-exhausted claims to the original petition.” King v. Ryan, 564  
 18        F.3d 1133, 1134 (9th Cir. 2009) (citing Kelly, 315 F.3d at 1070-71). A petitioner seeking to  
 19        avail himself of the Kelly three-step procedure is not required to show good cause as under  
 20        Rhines, but rather must eventually show that the amendment of any newly exhausted claims back  
 21        into the petition satisfies both Mayle v. Felix, 545 U.S. 644, 655 (2005), by sharing a “common  
 22        core of operative facts” and Duncan v. Walker, 533 U.S. 167 (2001), by complying with the  
 23        statute of limitations. King, 564 F.3d at 1141-43.

24        Petitioner is cautioned that each of the three options outlined above has risks and  
 25        drawbacks that he should take into account in deciding which one to choose. If he chooses  
 26        option (1) and goes forward with only his exhausted claims, he may face dismissal of any  
 27        later-filed petition challenging the underlying conviction and sentence. See 28 U.S.C. § 2244(b).

1 If he chooses option (2), dismissing this action and returning to state court to exhaust all claims  
2 before filing a new federal petition, his new federal petition may be rejected as time-barred. See  
3 28 U.S.C. § 2244(d).

4 If petition chooses option (3), and it appears that he has attempted to do so, he must file a  
5 motion in this court to obtain a stay of his mixed petition and demonstrate good cause for failing  
6 to exhaust under Rhines. Alternatively, petitioner could amend his petition to delete the  
7 unexhausted claim, file a motion to stay and hold that amended petition in abeyance, return to  
8 the state court to exhaust his unexhausted claim, and later amend his petition to re-attach the  
9 newly-exhausted claim, under King/Kelly. If the motion to stay is ultimately granted, petitioner  
10 then must act diligently to file a petition in the California Supreme Court and obtain a decision  
11 from that court on his unexhausted claim. Petitioner then must return to this court. Under option  
12 (3), this action stalls. This court will do nothing further to resolve the case while petitioner is  
13 diligently seeking relief in state court.

14 Petitioner's motion to stay does not have sufficient information under Rhines to  
15 determine whether a stay is warranted. Nor does petitioner's motion comply with King/Kelly.  
16 Thus, petitioner's motion to stay is DENIED without prejudice. Should petitioner choose option  
17 (3), he must either file a motion to stay pursuant to Rhines, or he must amend his petition to  
18 delete the unexhausted claim and file a motion to stay, pursuant to King/Kelly.

### 19 CONCLUSION

20 Respondent's motion to dismiss is GRANTED. Petitioner's motion for a stay and  
21 abeyance is DENIED without prejudice.

22 Within thirty days of the date of this order, petitioner must serve and file a notice in  
23 which he states whether he elects Option 1, 2, or 3. If petitioner chooses Option (1) or Option  
24 (2), his filing need not be a long document; it is sufficient if he files a one-page document  
25 entitled "Election By Petitioner" and states simply: "Petitioner elects to proceed under Option  
26 \_\_\_\_\_ provided in the court's order dated \_\_\_\_\_. " Petitioner must insert a number in place of  
27 the blank space to indicate which of the first two options he chooses and insert the date of the  
28



UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

GERRY PHONGBOUPHA,  
Plaintiff,

Case Number: CV12-01025 RMW

**CERTIFICATE OF SERVICE**

v.

A HEDGPETH et al,  
Defendant.

\_\_\_\_\_/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 12, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gerry GP Phongbouphe G-29087  
Salinas Valley State Prison  
PO Box 1050  
Soledad, CA 93960

Dated: October 12, 2012

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk